

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition of Advanced Care Scripts, Inc. for
Waiver

CG Docket No. 02-278

CG Docket No. 05-338

**COMMENTS OF JEFFERSON RADIATION ONCOLOGY, LLC ON PETITION OF
ADVANCED CARE SCRIPTS, INC. FOR WAIVER**

INTRODUCTION

Jefferson Radiation Oncology, LLC (hereinafter “Jefferson Radiation”) is a small medical practice that provides radiation therapy to patients suffering from cancer in the Greater New Orleans Area. Jefferson Radiation commenced an action on April 30, 2015, in the United States District Court for the Eastern District of Louisiana against Advanced Care Scripts, Inc. (hereinafter “ACS”) for sending fax advertisements in direct violation of the TCPA and the Federal Communications Commission’s (hereinafter “Commission”) regulations. Jefferson Radiation commenced the action to stop junk faxes that regularly interfere with its business and to obtain damages to compensate it and other junk fax victims and deter future violations. Contrary to the representations made by ACS in its Petition for Waiver, its fax advertisements are neither useful nor convenient to Jefferson Radiation’s medical practice. In fact, the fax advertisements are annoying, unwanted, inconvenient and utilize Jefferson Radiation’s resources, which is exactly what the TCPA was enacted to prevent.

For its part, ACS is a national specialty pharmacy company that has resorted to a large-scale junk fax program to promote its products. Upon information and belief, ACS generates over one billion dollars in gross profits annually. ACS sent numerous fax advertisements to

Jefferson Radiation. Jefferson Radiation did not give ACS permission to send it any faxes and did not have an established business relationship with ACS. Moreover, ACS was actively sending out thousands of fax advertisements up until suit was filed on April 30, 2015 by Jefferson Radiation, including during the time frame in which the Commission granted a six-month window to request a waiver.

On November 12, 2015, over six months after Jefferson Radiation's lawsuit was filed, ACS requested a waiver from the Commission. ACS now seeks a waiver because the fax advertisements sent by ACS clearly do not contain the mandated opt-out language, and thus subject ACS to liability.

DISCUSSION

I. ACS was neither confused by nor misplaced confidence in the TCPA or the Commission Orders.

ACS' waiver request emanates from the October 30, 2014 Order ("Anda Commission Order") handed down by the Commission. In its Anda Commission Order, the Commission stated that it **may** waive its rules for good cause shown. A waiver **may** be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule. Specifically, the Commission found that special circumstances existed, because a footnote contained in the Junk Fax Order caused **confusion or misplaced confidence** regarding the applicability of the opt-out notice requirement to faxes sent to recipients who provided prior express permission. The Commission stated in the Anda Commission Order that "[t]he use of the word 'unsolicited' in this one instance may have caused some parties to **misconstrue** the Commission's intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient."

However, the Commission clearly distinguished confusion from ignorance. The

Commission specifically stated **“that simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for a waiver.”** [emphasis added]. Thus, a large national company such as ACS can not simply stick its head in the sand, then seek a waiver from the Commission for its failure to adhere to the opt-out requirements for fax advertisements once a lawsuit is brought by an aggrieved party.

In its August 28, 2015 Order, the Commission once again found that confusion warranted a waiver for another group of petitioners. However, a question arose as to whether the petitioners were required to make a showing of actual confusion to obtain a waiver. In addressing this issue, the Commission Order provided that “the Commission has established that petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence. We find that the 117 petitioners satisfy the 2014 Anda Commission Order’s test for waiver by referencing the confusing language in the Commission’s fax opt-out decision, **and that no record evidence rebuts the resulting presumption of confusion or misplaced confidence.**” [emphasis added].

Attempting to seize upon this new presumption established by the August 28, 2015 Order, ACS filed a Petition for Waiver on November 12, 2015. In doing so, ACS referenced the “confusing” language, although it was careful not to suggest that ACS was confused, and for good reason. Jefferson Radiation conducted the 30(b)(6) corporate deposition of ACS on November 18, 2015. Steven Lynch, who is currently ACS’ senior director of business development, appeared on behalf of ACS as a corporate representative. Mr. Lynch testified that ACS had no knowledge of the TCPA or any Commission Orders prior to the litigation with Jefferson Radiation; that ACS was not confused by the TCPA or any Commission Orders; and admitted that ACS’ failure to comply with the TCPA requirements was because of ignorance of

the law. See (Exhibit A, Deposition Excerpts of Steven Lynch) . The following exchange took place during Mr. Lynch's corporate deposition:

Q: Do you know whether or not anyone with ACS reviewed the law at the time that you all were sending these blast faxes out to see if you complied with the law?

A: I'm not aware of anyone.¹

Q: You were in charge of the fact – of setting up the fax blast program, correct?

A: Correct.

Q: And so if anyone was reviewing the law associated with the fax blast program, it would have likely been you, correct?

A: Correct.

Q: All right. Now, you indicated that – well, I mean, I'm curious. Have you ever read the TCPA at all?

A: I have not.

Q: And you're not aware of anybody at, at ACS that read the TCPA in connection with this fax blast program?

A: I'm not aware.

Q: And, and prior to this litigation you didn't consult with anybody concerning the TCPA?

A: I did not.

Q: All right. **So it's not a question of whether you were confused as to what language was required by the TCPA, it was because you never read the language in the TCPA. Would that be, would that be a correct statement?**

A: **Yes.**

Q: All right. Can't be confused about something you didn't read.

A: I have not read – I did not read it, so I'm not confused because of – because I read it and was confused.

¹ Objections and colloquy between counsel have been redacted from the testimony. However, the unredacted deposition transcripts are attached hereto as exhibits.

Q: Okay. So you didn't read the law so you weren't confused with what the law provided. Is that right?

A: **I'm not confused about what the law provided because I have not read it.**

Q: If we were to assume that ACS did not comply with the requirements of the TCPA as it relates to the opt-out provisions, would it be fair to say that the reason why ACS did not comply was because they were unaware of what the law provided, and not because they were confused as to what the law provided?

A: We were not aware of what the law provided.

Q: **So basically, then, you're telling me that the reason why you didn't comply – if, in fact, it's determine that you didn't comply – was because of ignorance of the law. Is that correct?**

A: **That is correct.**

Q: Mr. Lynch, I'm going to show you what is a Federal Communications Commission order that was released on October 30, 2014, that addresses these junk fax advertise – what – it addresses junk fax advertisements and blast faxes. Okay?

A: Okay.

Q: Have you ever seen that before?

A: I have not.

Q: All right. So I take it that you've never read it, no one's ever told you about it. Is that correct.

A: That's correct.

Q: All right. Now, so ACS has no basis then, to your knowledge, to allege that they were confused about any prior Federal Communications Commission's rulings or orders?

Q: Is that correct?

A: I'm not sure I understand that question.

Q: Well, if no one, to your knowledge, has either read any of the orders, or is aware of any of the orders, then would it be fair to say that no one can say, to your knowledge, that they're confused about the orders?

A: That, that would be accurate.

Undersigned counsel also conducted the deposition of Dennis Wilson, a general manager with ACS, who also appeared as a corporate representative. See (Exhibit B, Deposition Excerpts of Dennis Wilson). Mr. Wilson testified as follows:

Q: All right. We have as item number 13 any and all communications, written or verbal, to or from the Federal Communication Commission within the last 10 years which in any way relates to the transmission of faxes by the defendant to any person or entity. I'm aware of one that was filed on Friday involving a request for waiver, are you familiar with that request?

A: I was informed of that.

Q: Have you seen the application?

A: I have not.

Q: All right. Who informed you of that?

A: The counsel.

Q: All right. Was there any other communication with the FCC prior to that request for a waiver?

A: Not to my knowledge.

Q: In the last 10 years, are you familiar with any – you've only been there five years. With the last five years, are you familiar with any communication with the FCC as it relates to the transmission of faxes?

A: No, not to my knowledge.

Q: All right. Or did you have an opportunity to search your records within the last 10 years, the five years preceding your employment with ACS, to determine whether or not there was any communication with the FCC concerning the transmission of faxes?

A: Locally, the records were searched and no record of anything. And my understanding is also corporate, there were records searched with no record of anything.

Q: And the compliance department that was referenced earlier, is it my understanding that they're never asked to determine whether or not fax

transmissions comply with the law, more specifically, the TCPA, and the rules and regulations of the FCC interpreting those statutes?

A: To my knowledge, that has not been presented to them.

Q: **Okay. So before fax transmissions go out, you're not aware of any effort that is made by ACS to see whether or not transmissions comply with the TCPA and the rules and regulations interpreting the TCPA as provided by the FCC?**

A: **To my knowledge, that was not done in the past.**

The foregoing sworn testimony clearly rebuts any presumption of confusion or misplaced confidence on the part of ACS. By ACS' own admission, its failure to comply with the TCPA was the result of ignorance of the law. The Commission has stated **"that simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for a waiver."** [emphasis added]. In fact, the Commission's Order recently released on December 9, 2015, denied waiver requests by five entities on the grounds that simple ignorance of the TCPA or its regulations is not grounds for a waiver. In doing so, the Commission stated that, "we deny five of the requests for waiver insofar as petitioners admit to being unaware of the opt-out notice requirement and, therefore, not similarly situated to the initial waiver recipients, consistent with the Commission's statement that 'simple ignorance of the TCPA or the Commission's attendant regulations is not grounds for a waiver.'"

The deposition testimony in this matter makes it clear that ACS was simply unaware, or ignorant, of the TCPA and the attendant regulations relating to the opt-out requirement. Given the evidence submitted herewith, along with the Commission's prior Orders, ACS' request for a waiver should be denied.

II. ACS made "no effort" rather than "every effort" to file its retroactive waiver petition within six months of the release of the October 30, 2014 Order.

ACS failed to make any effort to file its November 12, 2015 petition until well after April

30, 2015. ACS is not claiming that it had hired counsel to file the Petition prior to April 30, 2015 or that someone forgot to file it by said date. Rather, ACS made no effort to file until well after it was sued by Jefferson Radiation. In fact, during the time in which the Commission requested that “every effort” be made to file its retroactive waiver petition, ACS was doing the opposite: it was actively sending out thousands of unlawful fax advertisements. By way of example, Jefferson Radiation received a fax advertisement on April 10, 2015 from ACS.

Furthermore, ACS chose to defend its practices in litigation, including filing motions, producing over 600,000 documents, and partaking in depositions across the country. These actions by ACS clearly indicate that it has waived any opportunity for a retroactive waiver.

If the Commission were to grant the instant Petition, the requirement that junk-faxers make “every effort” to file by April 30, 2015 – a generous six months after the October 30, 2014 Order was issued – would be rendered meaningless. Under Petitioner’s delay theory, it could have waited until 2019, the last year of the TCPA’s four-year statute of limitations, to see if it would get sued for its TCPA violating actions, and could still argue that its failure to file within six months of the October 30, 2014 Order should be excused.

III. It would violate public policy to grant ACS a waiver.

In the Anda Commission Order, the Commission recognized two competing public interests: (1) an interest in protecting parties from substantial damages if they violated the opt-out requirement due to confusion or misplaced confidence, and (2) an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax advertisements. The former does not apply here. ACS’ failure to provide valid opt-out notices did not result from confusion or misplaced confidence, rather it has admitted through sworn testimony that it was completely ignorant of the TCPA and its

requirements, and did not make any effort prior to being sued to determine the requirements of the TCPA. Based upon this fact alone, it is apparent that the interests of consumers like Jefferson Radiation in obtaining compensation for ACS' violations of the regulation, by contrast, are manifest.²

CONCLUSION

The Commission should deny the waiver Petition of Advanced Care Scripts, Inc. because (1) Advanced Care Scripts, Inc. failed to fulfill the requirements provided in the Anda Commission Order, (2) Advanced Care Scripts, Inc. made no effort to file the waiver Petition until November 11, 2015, and (3) it would violate public policy to grant Advanced Care Scripts, Inc.'s waiver request.

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Although the FCC has previously ruled on the separation of powers argument made by previous commentors, solely out of an abundance of caution, Jefferson Radiation also asserts that the FCC lacks the authority to "waive" violations of the regulations prescribed under the Telephone Consumer Protection Act in a private right of action.